Supreme Court, U.S.
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No. 95-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

DAVID J. RAGAN,

Petitioner,

CONTICOMMODITY SERVICES, INC. and
CONTINENTAL GRAIN COMPANY,

Respondents,

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, under Rule 56, F.R.Civ.P. and this Court's decision in Celotex Corp. v. Catrett, a movant may carry the burden of a summary judgment motion simply by asserting generally that the non-movant lacks evidence of an element of his claim such as "actual malice" without specifying what acts the purported lack of evidence relates to and/or what portion of the record allegedly indicates that lack of evidence.

2. Whether, under New York Times v. Sullivan and its progeny, statements of a purely subjective belief in the truthfulness of a defamatory statement are sufficient as a matter of law to establish a lack of "actual malice" when the defamatory statements admittedly lack factual support and are contrary to facts of record showing that the speaker knew that the defamatory statements are false.

LIST OF PARTIES AND RULE 29.1 STATEMENT

There are no parties to this proceeding not revealed in the caption of this case.

Respondent ContiCommodity Services, Inc. is a wholly-owned subsidiary of Respondent Continental Grain Company, whose shares are not publicly traded.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner David J. Ragan respectfully requests this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on September 12, 1995.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 63 F.3d 438 (5th Cir. 1995) and is reprinted in the Appendix at App. 1A-16A.

JURISDICTION

On September 12, 1995, the United States Court of Appeals for the Fifth Circuit entered its order affirming the decision of the district court. (App. 1A) Petitioner timely filed a Petition for Rehearing on September 26, 1995. The Petition for Rehearing was denied on October 11, 1995. (App. 17A-18A). The mandate issued on October 19, 1995.

Petitioner invokes this Court's jurisdiction under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

From in or about August 1981 until May 24, 1984, Petitioner David J. Ragan ("Ragan") was employed by ContiCommodity Services, Inc. ("Conti") to trade government securities and futures contracts for customers at ContiArbitrage-Houston ("CAH"). CAH was one of Conti's branch offices. Conti was, and is, a wholly owned subsidiary of the Continental Grain Company ("Continental"). (App.1A, 3A).[1]

As part of the CAH operation, Conti routinely lent the CAH customers the funds needed for trading government securities. (App.3A-4A). Government securities have fixed maturity dates and values and, for Treasury Bills and Notes, fixed rates of coupon interest paid at regular intervals. As a result, the customer loans were always repaid, and profits were realized, from the locked-in coupon interest payments and/or increases in values as the securities matured. (R.6:4714-22; 4827; Dkt No.1483, ¶¶58, 298-99, 323; Dkt.#1420, ¶15).

A. The CAH Shutdown And Its Aftermath

On May 24, 1984, Continental ordered Conti to close out all of the government securities positions in the CAH customers' accounts within 24 hours. (App.4A-5A). Continental ordered the shutdown for its own business

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[1] References to the Appendix herein are cited as "App.__."

reasons unrelated to the CAH loan program or any CAH customer profits or losses. (R.7:4569-72; Dkt.#1483, ¶65; Dkt.#1420 ¶64; D. Ragan Dep. at 2886-87).[2]. Conti, in turn, ordered Ragan to close out the CAH customers' positions, telling him that if he did not close out the positions, then Conti-Chicago would close out the positions itself. (R.6:4624; D. Ragan Dep. at 2871-73).

Knowing that he could do a better job than anyone at Conti-Chicago at closing out the customer positions as profitably as possible in what had been a "down" market for several months, Ragan closed out the customer positions. Ragan protested the closing, reminding Conti that the closeout would cause the realization of massive losses in the customer accounts. He told Conti management that if the accounts were left open only a little longer, then they could be closed out profitably. Conti insisted that the positions be closed out. (D. Ragan Dep. at 2871-73, 3087).

The shutdown came without warning to any of the CAH customers. (See, D.Ragan Dep. at 2886-87). At that time, because of several months of adverse market

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[2] Certain of the pleadings filed in the Northern District of Illinois were not included in the record compiled by the Clerk of the Southern District of Texas. On motion of the parties, those pleadings were added as supplements to the record and are referred to by their docket numbers on the Northern District of Illinois's docket sheet.

The docket sheet is Item number 2 in Ragan's Record Excerpts provided to the Fifth Circuit and is hereinafter cited as "Rec. Ex." References to the Record on Appeal are cited as "R.___."

movements, Conti had $55 million in outstanding payments to government securities dealers on behalf of the CAH customers.[3] (App. 4A-5A). After the shutdown, Conti could not recoup those payments because the securities that were the intended source of repayment had been sold on Continental's orders on May 24, 1984.

Ragan resigned from Conti the following day, May 25, 1984 and immediately went to work for Merrill, Lynch. (R.7:4546-49; Dkt.#1483 ¶¶35, 284-85)

At the time of the May 24, 1984 shutdown, Conti and Continental had been under regulatory scrutiny both for their parts in the Hunt brother's late-1970s efforts to corner the silver market and for the closing of another of Conti's branch offices that had been doing commodities trading in cocoa and sugar. (Rec. Ex. 12). Additionally, despite the fact that it was Conti's and Continental's premature

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[3] This amount was not unusual. Nine months earlier, in August 1983, Conti had approximately $33 million in outstanding payments to the dealers. Over the next five months, Ragan and his traders realized approximately $15 million in profits, thereby reducing the outstanding dealer balances to approximately $18 million by the end of January, 1984. (R.6:4692-95). In February 1984, the market declined somewhat and the dealer payments increased again to $33 million. Prices flattened in April before dipping steeply in May 1984. (Id.). The market turned upward again within days of the shutdown and began a 2-year climb. The combination of maturing securities, interest payments and the improved market would have entirely eliminated the dealer payouts four months later,in October, 1984, and would have resulted in ever increasing profits for the CAH customers for at least the next two years. (R.2:5610, 5606, 5602).

closeout of the customer positions that had transformed the $55 million in temporary dealer payouts to final realized losses for the customers, Conti and Continental still wanted to recover as much of the money as possible for themselves. To accomplish this end, for the first time since the inception of CAH, they began sending out margin calls for negative balances in the government securities side of the trading. (Rec. Ex.13; R.6:4699; Dkt. #1421, ¶¶769-70).

Against this background, they were not only facing the probability of CAH customer lawsuits as a result of the CAH shutdown, but they also had a crisis in their final bookkeeping reconciliation of the CAH accounts following the shutdown. The CAH backoffice was in chaos after the shutdown with a large number of the closeout trades not yet put into their proper accounts. (R.6:4772-74; 4784-86; Dkt. #1483, ¶282; Dkt.#1421, ¶¶814-22, 826).

B. Conti And Continental's Efforts To Blame Ragan For The Losses

Immediately after the shutdown, Conti and Continental began pressuring Ragan to take personal blame for the losses. They also wanted Ragan to oversee the final bookkeeping process. They intended thereby to take advantage of the backoffice chaos to place the bulk of the losses in the accounts of "deep pocket" customers. Conti and Continental believed that those customers would be more likely to pay, at least something, if they were sued for the losses in their accounts. (Rec. Ex. 13; D. Ragan Dep. at 2865-71). Ragan refused. Id.

Conti and Continental began threatening Ragan with

the loss of his trading license and the ruin of his career unless he acted like a "team player" and did their bidding. Ragan still refused. (Id.).

C. Conti's And Continental's Reprisals Against Ragan

Although Ragan had resigned from Conti on May 25, 1984, on June 22, 1984, Conti falsely reported to the Chicago Board of Trade ("CBOT") that it had "terminated" Ragan on June 7, 1984. (Rec. Exc. 14 at 1.)

One week later, on June 29, 1984, Conti and Continental representatives and their accountants met with Merrill, Lynch executives at Continental's New York headquarters. According to the Merrill, Lynch representatives and at least one Conti representative who were present, during the June 29, 1984 meeting, the Conti and Continental representatives told Merrill, Lynch, *inter alia*, that: i) Ragan was dishonest in his CAH trading; ii) Ragan had caused the CAH losses by putting on a $1.5 billion unhedged, unarbitraged position in the Spring of 1984; iii) Ragan had put favorable trades into the accounts of himself and preferred customers such as his father; and iv) that, as a result of Ragan's unprofitable trading, Continental had been forced to inject $40 million in additional capital into CAH. The Merrill, Lynch executives testified that the entire tone of the meeting implied that Ragan had engaged in criminal conduct. (Dkt.#1483, ¶¶287-99).

Merrill, Lynch immediately fired Ragan. (Rec. Ex. 13). Conti immediately thereafter rehired him to oversee the final CAH bookkeeping reconciliation. (Dkt. # 1421,

¶¶875, 881). When it became clear by September 1984, that Ragan still would not be a "team player", however, Conti fired him.

Conti and Continental thereafter informed the CBOT that Ragan had concealed the CAH losses from Conti, explaining that was the reason that Conti had failed to meet its net capital requirements in violation of CBOT regulations. Conti and Continental also charged that Ragan had failed to follow orders during the final CAH bookkeeping reconciliation process. (Rec. Ex.14 at 2-3).

As a result, based on Conti's and Continental's statements, the CBOT concluded that Ragan had improperly handled the CAH accounts, had misled Conti about both the volume of his trading and the extent of the CAH losses, and had disobeyed instructions, thereby causing Conti severe financial losses. Ragan's license was summarily suspended. (Rec. Ex.14 at 2-3).

Contemporaneously with the CBOT action, Conti and Continental filed a pre-judgment attachment action in Kentucky where Ragan had a farm. (R.24:167-81). Ragan subsequently filed a Chapter 11 proceeding in the Bankruptcy Court in Lexington, Kentucky.

II. PROCEDURAL BACKGROUND

In November 1984, Conti and Continental sued Ragan. Ragan counterclaimed alleging, *inter alia*, defamation, tortious interference, and breach of contract. These cases were consolidated with others filed in the wake of the CAH shutdown as Multi-District Litigation No. 644 ("MDL 644"). The multidistrict litigation was assigned to

the Northern District of Illinois. (App. 1A, 3A, 5A-6A).

The district courts that handled this case had jurisdiction over Ragan's counterclaims under 28 U.S.C. §1332 due to the complete diversity of the parties. Ragan is, and was, a resident of the State of Texas while Continental and Conti are both corporations organized under the laws of the State of Delaware. Continental has, and had its principal place of business in New York, New York. Conti has, and had its principal place of business in Chicago, Illinois. The amounts in controversy substantially exceeded $50,000.

A. The 1989 Summary Judgment Proceedings In Illinois

In 1989, Conti and Continental moved for summary judgment on Ragan's claims. The Illinois district court granted their motion on most of Ragan's claims. The district court denied their motion as to Ragan's defamation claim. The district court also granted only partial summary judgment on Ragan's tortious interference claim. (App.5A, 8A).

The district court held that Ragan had shown that Conti and Continental had intended to induce his firing at Merrill Lynch and that they had induced his firing through the information that they had conveyed to Merrill, Lynch. The district court, however, also held that Ragan had not shown the loss of any other employment as a result of Conti's and Continental's actions. Therefore, the district court held that Ragan's damage claims would be limited to the loss of his Merrill, Lynch employment. (App.8A).

B. The 1993 Texas Summary Judgment Proceedings

In 1990, following ruling on the parties' summary judgment motions, the Illinois district court transferred the remaining claims of Ragan, Conti and Continental back to the Southern District of Texas -- where the cases had originally been filed -- for trial. (App.5A).

In February 1989, Ragan was indicted for wire and mail fraud based on five transactions that had been put into the Conti computers by one of the CAH backoffice personnel. In September 1992, a jury found him guilty on all counts. On June 14, 1994, the United States Court of Appeals for the Fifth Circuit reversed the conviction without remand, finding that there was "no" evidence linking Ragan to the indictment transactions. (App.7A, 9A); United States v. Ragan, 24 F.3d 657, 660 (5th Cir. 1994).

While Ragan's conviction was on appeal, Conti and Continental moved for summary judgment again. They incorrectly argued that Ragan's remaining claims were based only on his allegations that Conti and Continental had accused him of criminal misconduct (rather than on the specific statements set forth in §I.C., *supra*, and that, therefore, his criminal conviction proved that their statements to Merrill, Lynch were true. R.3:5308-29, 5333-5438; R.4:5123-5264A, 5267-5302).

In Conti's and Continental's 1990 summary judgment motion, their discussion of Ragan's criminal conviction consumes approximately six pages. In the middle of that discussion, the following paragraph appears:

> In addition, an employer such as Conti is entitled to qualified immunity in commenting in good faith on the character of a former employee such as David Ragan. [citations omitted]. The fact that Conti's alleged comments on Ragan's character have proven accurate demonstrates Conti's good faith.

(R.4:5255)

In their motion, Conti and Continental did not point to any comments that allegedly had been proven accurate.

In response, Ragan provided the Texas district court -- as he had previously done for the Illinois district court -- with the specific statements and the supporting evidence on which his claims for tortious interference and defamation were based; those set forth in §I.C., *supra*. He pointed out that: i) Conti's and Continental's wrongful statements went far beyond Conti's and Continental's suggestions of criminal misconduct in the Merrill, Lynch meeting; and ii) even those statements did not include any allegation that Conti and Continental had told Merrill, Lynch that he had engaged in the conduct charged in the indictment. (R.4:5297)

Consequently, Ragan explained, the criminal conviction could not, as a matter of law, act to collaterally estop him from proving the falsity of Conti's and Continental's wrongful statements on which his claims were actually based. Moreover, Ragan explained, even if collateral estoppel applied to his claims insofar as they were based on false allegations of criminal misconduct, then that should result in only partial summary judgment

because his claims were based on other false statements in addition to those concerning criminal misconduct. Ragan also urged the district court to delay its ruling until the conclusion of the criminal appeal because that conviction was fatally flawed and should be reversed. (R.4:5267-5302).

Ragan further responded to Conti's and Continental's reference to their purported "good faith" by explaining again that, because he had never claimed that Conti and Continental had ever falsely accused him of the conduct charged in the indictment, any discussions about "good faith" based on the criminal conviction were irrelevant. (R.4:5296, n.7).

On July 16, 1993, the Texas district court granted Conti's and Continental's summary judgment motion in a one paragraph Order stating in pertinent part only that, "David Ragan's criminal conviction eliminates any genuine issue of material fact regarding the issue of truth..." (App.7A-8A).

On April 14, 1994, the district court dismissed with prejudice all of Ragan's claims against Conti and Continental.[4] At Conti's and Continental's request, in its

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[4] Conti and Continental's claims against Ragan, however, remain pending -- but stayed -- in the district court. On appeal, Conti and Continental promised the Fifth Circuit that they would dismiss their claims if the Fifth Circuit affirmed summary judgment. Conti and Continental have told the district court that they want their claims to continue stayed because they need to retain those claims as "leverage" against Ragan in ongoing litigation between them pending in the

April 14, 1994 Order and pursuant to F.R.Civ.P. 54(b), the district court also expressly found that there was no just reason to delay entry of a final judgment dismissing appellants' claims or to delay appeal of that judgment. Final judgment was, therefore, entered on Ragan's claims on April 14, 1995 thereby making that judgment final and appealable. (App.7A-8A).

Ragan's Notice of Appeal was timely-filed on May 6, 1994. Five weeks later, on June 14, 1994, the Fifth Circuit reversed outright Ragan's criminal conviction with its "no" evidence determination. United States v. Ragan, 24 F.3d 657, 660 (5th Cir. 1994).

C. Conti And Continental Raise The Issue Of "Malice" On Appeal

In his opening Fifth Circuit brief, Ragan pointed out, *inter alia*, that the summary judgment on his claims should be reversed under Rule 60(b), F.R.Civ.P. because of the reversal of the criminal conviction. He also repeated his arguments made to the district court, *inter alia*, that his defamation and tortious interference claims had never included any allegation that Conti and Continental had ever falsely accused him of the conduct charged in the indictment. Hence, the doctrine of collateral estoppel (on which the district court apparently had rested its summary judgment) could not apply as a matter of law. (Ragan's Br. at 33-36).

In response, Conti and Continental conceded that

Illinois state courts.

the reversal of the criminal conviction meant that the summary judgment could no longer stand on its only express basis. They argued, however, that summary judgment still could be affirmed on an alternate ground that Ragan had failed to show by clear and convincing evidence that Conti and Continental had acted with malice when making their false statements on which Ragan's claims actually were based. They told the Fifth Circuit that they had raised the issue of malice in connection with those statements in their summary judgment motion in their one paragraph on "good faith" quoted above in §II.B., *supra*. They argued that Ragan had never responded with evidence contradicting their assertion that they had acted without malice when making the statements on which Ragan's claims were based. (Conti/Continental Br. at 34-39).

As support for their contention that they had not acted with malice, in their Fifth Circuit brief, they quoted for the first time from an affidavit given by a Conti executive, Robert Stain, who had attended the Merrill, Lynch meeting. They also referred for the first time to the excerpt of a deposition of the same witness included in an appendix to their Fifth Circuit brief. Neither the affidavit nor the deposition had ever been submitted to the Texas district court as part of Conti's and Continental's 1993 summary judgment motion. (Conti/Continental Br. at 38; Rec. Ex.1).

The affidavit had been submitted only to the Illinois district court in 1989. At that time, it was provided in opposition to the summary judgment motion of an unrelated party in the multidistrict litigation. (Conti/Continental Br. at 38; Rec. Ex.1).

The quote from the affidavit states:

"2. In the first week of May 1984, Herbert Evers, Conti's President, requested that I go to Conti's Houston Arbitrage branch office to supervise certain activities in that office. During the course of my discussion with Mr. Evers at this time, Mr. Evers stated that he had learned some things that had caused him to believe that David Ragan, the manager of the Houston Arbitrage branch, was being dishonest with us.

"3. It was my understanding at the time that Mr. Evers' comment concerning Mr. Ragan's honesty reflected Mr. Ever's concern with Mr. Ragan's inability or unwillingness to provide Mr. Evers with precise information relating to trading losses Mr. Ragan may have sustained. Mr. Evers did not suggest to me in early May 1984, nor did I then believe, that Mr. Ragan had engaged in conduct that had the effect of improperly benefitting himself or others at the expense of Conti or its customers. I did not begin to form the belief that Mr. Ragan had engaged in such improper conduct until late May 1984, based on information that became available to me during my stay in Houston." (DK No.1420, Ex. B., ¶¶2&3; DK No. 1543-4:¶287; Appellees' Record Excerpts, Ex.2, Stain Dep. at 871).)(sic)

The deposition excerpt in the Fifth Circuit Appendix only confirms that, during the June 29, 1984 meeting, Conti and Continental told Merrill, Lynch that they "felt" that Ragan was dishonest in his handling of the CAH trading, but it provides no facts on the nature or basis of

that "feeling."

Conti never identified, described or explained anywhere in its Fifth Circuit brief what information Mr. Evers allegedly learned, what alleged information Mr. Stain acquired in late May 1984 or, on what basis Conti and Continental "felt" that Ragan was "dishonest" by the time of the June 29, 1984 Merrill, Lynch meeting.

The deposition excerpt of another attender of the Merrill, Lynch meeting -- also included for the first time as an excerpt to Conti's and Continental's Fifth Circuit brief -- confirmed that Conti and Continental had no evidence of wrongful transactions allegedly engaged in by Ragan until October 1984; four months after the Merrill, Lynch meeting and the false statements. (Conti/Continental Br., Rec. Ex.3). Again, Conti and Continental never identified, explained or described anywhere in their Fifth Circuit brief what that "evidence" was.

Ragan replied that Conti and Continental were improperly raising the "malice" issue for the first time on appeal. He pointed out that Conti's and Continental's one paragraph on "good faith", both in context, and because of its reference to Conti's statements having been "proved correct", could only have referred to accusations concerning the conduct charged in the indictment because those were the only statements that Conti and Continental could have claimed had been proved correct and those accusations had never been part of Ragan's claims. (Ragan Reply Br. at 11-12).

Consequently, Ragan explained, contrary to the assertions in Conti's and Continental's brief, he had not

failed to respond in the district court to their "malice" issue, particularly concerning all of the statements on which he was actually basing his claims. Rather, he argued, Conti and Continental had never referred in any way to those statements in any of their summary judgment papers. Therefore, malice in connection with those statements on which his claims were actually based had never been raised in the district court. (Ragan Reply Br. at 11-12).

Notwithstanding those explanations, Ragan also directed the Fifth Circuit to the specific portions of the record where he had identified the statements on which his claims were based. (R.4:5297). He also directed the Fifth Circuit to the specific record evidence that showed that Conti and Continental knew that all of the defamatory statements were false at the time that they made them. (Ragan Reply Br. at 12-16).

This evidence included the fact that it was Conti-Chicago, not CAH or Ragan, that had daily balanced all of Conti's books for the CAH government securities trading and that had handled the daily disbursements to the dealers that eventually totalled up to $55 million at the time of the shutdown. Therefore, Conti and Continental knew the extent of the dealer payouts at all times and nothing about those payouts was, or could have been, concealed or misrepresented by Ragan. (R.6:4692-95; Ragan Br. at 13-19; Ragan Reply Br. at 14).

Ragan also directed the Fifth Circuit to the evidence that Conti-Chicago, not Ragan or CAH, had been fraudulently misreporting Conti's net capital for years. That was why Continental had to inject the $40 million in

additional capital into Conti in 1984; it was not because of anything that Ragan had done. That evidence also showed that, by the time discovery began in the multidistrict litigation, Conti and Continental had managed to "lose" or destroy all of the workpapers for Conti's two and a half years of net capital computations, presumably to conceal the fraud. (Ragan Br. at 22-23; Ragan Reply Br. at 13-14).

This and other evidence establishing that Conti and Continental knowingly made their wrongful statements was identified in the record and discussed by Ragan in his Reply Brief. (Ragan Reply Br. 11-15). Ragan also pointed out that the evidence that he identified was not only uncontested, but that Conti and Continental had not even referred to, or even discussed any of the evidence, much less tried to refute or contradict it. Id.

He also pointed out that Conti's and Continental's own summary judgment materials showed that, at the time of the Merrill, Lynch meeting, they admittedly had no evidence to support their wrongful statements and that they had none until four months after those statements were made. Although Conti and Continental had not identified that evidence, Ragan presumed that it had to do with the transactions that he had already identified to the district and the circuit courts. He noted that none of his evidence showing that the transactions were proper (and that Conti and Continental at all times knew they were proper) had been refuted, contradicted or even acknowledged by Conti and Continental. (Ragan Parties' Mtn. To Supp.)

On September 12, 1995, the United States Court of Appeals for the Fifth Circuit issued its Opinion in this case

affirming the district court's grant of summary judgment. (App.1A-16A). The Fifth Circuit held that the Texas district court had improperly granted summary judgment based on the now-reversed criminal conviction. The court noted that there is no legal basis for the proposition that any criminal conviction satisfies the "truth inquiry" for defamatory statements as Conti and Continental had persuaded the district court to rule. (App.8A-9A).

Instead of reversing the district court's summary judgment pursuant to Rule 60(b) as Ragan had requested, the Fifth Circuit accepted Conti's and Continental's suggestion that it affirm summary judgment on the grounds that Ragan had failed to show "malice" with regard to all of the wrongful statements that Conti and Continental had made on which Ragan's claims were actually based. (App.9A-14A). The Fifth Circuit never acknowledged or addressed the issue that Ragan had raised: Whether Conti and Continental had, in the district court, sufficiently raised the issue of "malice" with regard to all of the statements on which Ragan's claims are based, rather than raising the issue only in the narrow area of his criminal conviction. The Fifth Circuit simply stated that Conti's and Continental's summary judgment motion was "properly supported" and that they had carried their "initial burden to show the absence of evidence that [they] acted with malice." (App.11A, 12A).

In deciding that Ragan had failed to show malice sufficiently, the Fifth Circuit did not refer to any of the specific wrongful statements on which Ragan's claims rest. The Fifth Circuit also did not acknowledge any of the evidence that Ragan had identified in the record showing both, that Conti's and Continental's statements were false,

and that they were knowingly false when made. (App.9A-14A).

The only evidence the Fifth Circuit discussed was Conti's and Continental's acknowledgement that they had no evidence of any wrongdoing until four months after the Merrill, Lynch meeting. The Fifth Circuit did not mention that the later evidence was unidentified by Conti and Continental or that, what Ragan and the Fifth Circuit had to presume the evidence was, uncontestedly supported Ragan's favor. (App. 11A; Ragan Parties' Mtn. to Supp.).

Instead, the Fifth Circuit simply held that Conti's and Continental's claim that it developed (unidentified) evidence to support its wrongful statements four months after they were made, evenly balanced with the fact that they had no support for their statements when they were made. Therefore, the Fifth Circuit concluded, such evenly balanced evidence did not suffice to meet the "clear and convincing" standard applicable here. (App.11A). In so doing, the Fifth Circuit placed great reliance on its own case, decided just weeks before oral argument here, Duffy v. Leading Edge Products, Inc., 44 F.3d 308 (5th Cir. 1995). In Duffy, the Fifth Circuit decided a similar malice issue by a close examination of what the defendant "believed" at the time of their wrongful statements.

Based on: i) the Fifth Circuit's reliance on Duffy's emphasis on a defendant's subjective belief as to the truthfulness of the wrongful statements: ii) the Fifth Circuit's disregard of the evidence in the record showing Conti's and Continental's actual knowledge of the falsity of their statements: and iii) the fact that the only evidence Conti and Continental relied on for their motion was

belated references to their subjective beliefs without any explanation as to the factual bases for those beliefs, it appears that the Fifth Circuit granted summary judgment because Ragan did not refute the Conti's and Continental's statements as to their subjective beliefs. Implicit in that finding, given the evidence of record, is that objective evidence that the defendant knew the true facts at the time of the statements is irrelevant to the malice issue. Unless the plaintiff can produce some admission by the defendant that he entertained serious doubts as to the truthfulness of the statements -- even if that belief was directly contrary to his subjective belief -- then that belief is sufficient to defeat summary judgment.

A timely-filed Petition for Rehearing was denied by the Fifth Circuit on October 11, 1995. (App.17A-18A). This Petition seeks review of the Fifth Circuit's September 12, 1995 Opinion.

REASONS FOR GRANTING THE PETITION

The questions of what a summary judgment movant must do to sufficiently identify, what he claims are, uncontested issues of fact defeating one or more elements of the non-movant's case and what, if any record evidence he must identify to show that those issues are uncontested, present substantial questions of federal civil procedure. If, as happened here, a movant may simply stand up and say the nonmovant has no case and is not required to explain what particular aspect of the case is under fire or even to direct the district court and non-movant to the record evidence allegedly indicating that the non-movant lacks sufficient evidentiary support for his case, then both the courts and the litigants will be put to enormous

burdens.

When responding to such a non-focused motion, non-movants will be forced to "load up the boat" with all of the evidence that they can think of, with the hope that they have covered everything that the movant may later say was the subject of the motion. That will be particularly true where, as here, at least one of the issues may be intent or knowledge. Often, determinations of such subjective elements can only be made by examining the complete record. Consequently, if the Fifth Circuit's view prevails, the courts will have the task of performing complete paper trials, reviewing entire records through affidavits, documents, and depositions; evidence that could be better and more efficiently presented through live testimony and trial exhibits.

Similarly, if defendants in defamation cases may defeat summary judgment simply by asserting that they "believed" that what they said was true without having to explain the basis for that belief and regardless of all empirical evidence showing that they, in fact, knew the true facts, but spoke falsely anyway, then the law of defamation -- as well as any prudent First Amendment restrictions on speech -- are gone.

If this published decision begins to followed within the Fifth Circuit or is picked up by other Circuits, then these issues will have significance far beyond this case. Indeed, it appears that this case and the Fifth Circuit's recent decision in Duffy v. Leading Edge Products, Inc., 44 F.3d 308 (5th Cir. 1995), both of which focused on the subjective belief of the defamation defendant, are beginning in a trend in that direction.

The extreme nature of the facts of this case make it the appropriate vehicle in which to address these issues.

A. The Fifth Circuit's Ruling Eliminates This Court's Requirement In Celotex v. Catrett And Rule 56 F.R.Civ.P. That Summary Judgment Movants Must Carry An Initial Burden Of Informing The District Court Of The Basis For Their Motions And Identifying Those Portions Of The Record That Support Their Motions.

In Celotex v. Catrett, 477 U.S. 317, 323 (1986), this Court re-affirmed that a summary judgment movant under Rule 56, F.R.Civ.P. "always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions [of the record] which it believes demonstrate the absence of a genuine issue of material fact." Of course, the Court also held that a summary judgment movant may satisfy that burden by pointing out to the district court that there is an absence of evidence to support the nonmovant's case. 477 U.S. 325. Taken together, however, these portions of Celotex appear to hold that even when a movant proceeds by pointing out the alleged absence of evidence in the non-movant's case, the movant must still identify the specific subject of the motion and what any record evidence on that subject does show.

This is not to say that the movant must come forward with affirmative evidence; Celotex clearly holds otherwise. Nevertheless, it appears clear that the movant must still provide at least direction to the nonmovant and the district court in order to carry his initial burden.

This conclusion also follows from the citation in Celotex to the Court's earlier decision in Adickes v. S.H.Kress, 398 U.S. 144 (1970). In Celotex, the Court repeated the teaching of Adickes that the 1963 amendment to Rule 56(e), F.R.Civ.P. was not intended to reduce a movant's initial burden of showing the absence of any material fact. 477 U.S. 325. The Celotex Court also agreed that the summary judgment was properly denied in Adickes. Id.

In Adickes, summary judgment was denied because the movant had failed to negate a possible factual scenario under which the non-movant plaintiff could have prevailed. The Adickes Court that summary judgment was improper even though the movant argued that it should efectively win by default because the non-movant had failed to provide any direct evidence of her own on the issue in an affidavit or otherwise.

It was in that context that this Court held that the movant still retains the burden of first showing the absence of any material fact even if the nonmovant presents no opposing evidence at all. Even in that situation, the movant is still not entitled to summary judgment, the Court held, unless evidence identified in the motion sufficiently establishes that there is no question of material fact on the issue. 398 U.S. 156-60.

In their moving papers in the district court, Conti and Continental made only a general statement that they acted in "good faith." They did not point to any particular acts they had performed or statements they had made allegedly in "good faith." They provided no factual basis, and they pointed to no factual basis in the record, that

would establish their "good faith." In context, it appeared that they were referring only to irrelevant accusations they had made that Ragan had engaged in the conduct charged in the indictment; accusations which had never been part of Ragan's claims against Conti and Continental.

Even in the Fifth Circuit when Conti and Continental asserted for the first time that their reference to "good faith" was intended to encompass every wrongful act on which Ragan's claims were based, they neither identified the wrongful statements or acts, nor identified any evidence indicating a lack of actual malice in connection with those statements and acts. Their only "evidence" -- offered for the first time on appeal -- was an affidavit stating that in the Spring of 1984, various Conti executives "felt" or "believed" that Ragan was being dishonest.

Conti and Continental provide no explanation or support for this belief except a statement that four months later, Conti and Continental were given auditors' reports showing suspect transactions. Conti and Continental do not even identify these reports or explain what information they contained.

In response, Ragan countered with specific references to record evidence and explanations establishing through uncontested evidence that at all times Conti and Continental actually knew the true facts behind their statements.

Nevertheless, the Fifth Circuit still found that Conti's and Continental's motion was "well supported" and that they had "carried their burden." This conclusion is

clearly a rejection of Celotex and Adickes. Granted, one of the teachings of Celotex was that summary judgment was not to be disfavored and that district courts should no longer be reluctant to grant summary judgment where warranted. The Fifth Circuit, however, has taken Celotex to its most extreme; requiring nothing more of a movant that a bald assertion that the non-movant has no case. This Court should reverse such a radical interpretation of Celotex.

B. The Fifth Circuit Has Reduced New York Times v. Sullivan And Its Progeny To Nullities Through Its Complete Reliance On The Defendant's Self-Serving Statements Of "Good Faith."

This case was decided under the Texas law of defamation and malice. (App. 6A). Texas has adopted the standards set forth in this Court's decisions in New York Times v. Sullivan, 376 U.S. 686 (1964) and St. Amant v. Thompson, 390 U.S. 727 (1968) as Texas's law on defamation and actual malice. See, e.g., Casso v. Brand, 776 S.W.2d 551, 554, 558 (Tex. 1989)(expressly adopting the New York Times and St. Amant standards); Freedom Communications, Inc. v. Brand, 907 S.W.2d 614, 619-20 (Tex. App.--Corpus Christi 1995)(citing both New York Times and St. Amant and intervening Texas cases for the same standards). Consequently, the Fifth Circuit's decision in this case acts as a joint interpretation of both Texas and federal law as established in this Court's decisions.

Both the federal and the Texas cases have repeatedly relied on the St. Amant formula that to establish reckless disregard, one must provide sufficient evidence to permit

the conclusion that the defendant, in fact, entertained serious doubts as to the truth of the publication. 390 U.S. 731. The St. Amant decision, however, expressly rejects the idea that merely testifying that one acted in good faith will insure an automatic favorable verdict. The finder of fact, wrote the St. Amant court, must weigh the movant's protestations of good faith against empirical facts such as whether the statement is fabricated or based on unreliable or unverified statements of others. 390 U.S. at 731-33.

This weighing of subjective statements of good faith against objective facts showing possible knowledge or reckless disregard for the truth has carried down through the Court's most recent Opinions in this area. See, e.g., Masson v. New Yorker Magazine, 501 U.S. 496, 520-21 (1991)(summarizing factual issues and inconsistencies that could indicate reckless disregard).

Although Texas muddies the waters slightly, sometimes making it appear that the "serious doubts" element applies to knowingly false statements as well as to those spoken with reckless disregard for the truth, See, e.g., Hagler v. Proctor & Gamble Mfg. Co., 884 S.W.2d 771, 771-72 (Tex. 1994)(on which the Fifth Circuit placed great reliance), the Texas courts have not made the actual malice determination one based solely on the self-serving subjective statements of the defendant's alleged good faith. Rather, the Texas courts, including the seminal case relied on by both the Hagler court and the Fifth Circuit, Casso, continue to require the non-movant to provide other empirical evidence that would cast doubt and raise questions of fact concerning the defendant's own statements of purported good faith.

Indeed, the Casso court expressly rejected a "barebones" affidavit offering only unsupported allegations of "good faith", as was provided here, as being insufficient to entitle the movant to summary judgment even in the absence of contravening evidence from the non-movant. Such an affidavit does not prove that the defamatory statements were not made with knowledge that they were false or with reckless disregard for their falsity, the Casso court wrote. 776 S.W.2d at 559.

Hence, both Texas's and this Court's opinions have soundly rejected the idea that an affidavit or deposition testimony containing only unsubstantiated claims to "good faith" is sufficient to entitle a movant to summary judgment on the issue of "actual malice." Nevertheless, that is precisely the Fifth Circuit's holding in this case.

Conti and Continental provided the type of "barebones" affidavit expressly rejected in Casso. They claimed that they found supporting evidence four months after the statements, but they never identified that evidence and the Fifth Circuit never explained how purported evidence, never identified, and allegedly acquired months after defamatory statements were made, could possibly entitle a movant to summary judgment on whether the movant's earlier statements had been made with malice.

In opposition to this evidence, Ragan identified specific evidence in the record showing actual knowledge on the parts of Conti and Continental. The Fifth Circuit did not even mention this evidence, evidently finding Conti's unsupported claims of "good faith" to be sufficient. This is contrary to Texas and federal law and it appears to be a further step down the path of making malice

determinations entirely subjective as the Fifth Circuit began to do in the Duffy case. This Court should halt this trend before it proceeds further.

CONCLUSION

For the foregoing reasons, Petitioner David J. Ragan respectfully requests that the Court grant his Petition for a Writ of Certiorari.

Respectfully submitted,

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